

D.T.E. 01-72-A

Investigation by the Department of Telecommunications and Energy on its own motion commencing a rulemaking pursuant to 220 C.M.R. § 2.00 et seq., adopting regulations for the operation of motor vehicles for the carriage of passengers for hire under a certificate of public convenience and necessity, charter license, special service or school service permit contained in 220 C.M.R. § 155.00 et seq.

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ORDER PROMULGATING FINAL REGULATIONS

## I. INTRODUCTION

On March 28, 2002, the Department of Telecommunications and Energy (“Department”) opened a rulemaking proceeding to modify 220 C.M.R. § 155.00 et seq., entitled “Operation of Motor Vehicles for the Carriage of Passengers for Hire Under a Certificate of Public Convenience and Necessity, Charter License, Special Service or School Service Permit” by adding a provision prohibiting full/ad wrap<sup>1</sup> (“ad wrap”) on bus windows. Order Instituting Rulemaking, D.T.E. 01-72 (2002). The Department noted that several Massachusetts Regional Transit Authorities (“RTAs”) and private bus companies have utilized ad wrap to generate revenue to fund their transit systems (id. at 1). The Department expressed concern that ad wrap, which prevents the interior of motor vehicles from being viewed from the outside, presented a threat to the safety of operators and passengers aboard vehicles maintained by RTAs (id.). The Department is the designated oversight agency for RTAs and the Massachusetts Bay Transportation Authority (“MBTA”) for safety of equipment and operations pursuant to G.L. c. 161B, § 6(i) and G.L. c. 161A, § 3(i). In light of heightened security concerns after the terrorist attacks in New York City and Washington, D.C. on September 11, 2001, the Department recognized that public safety concerns override any

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<sup>1</sup> The advertising configuration called “full/ad wrap” used on certain buses and subway cars covers an entire bus or subway car, other than the windshield and the driver’s side windows, with a special spray or other covering that produces an artwork covering the outside of the vehicle.

advantages to revenue enhancement<sup>2</sup> ( see Letter from Director of Department's Transportation Division to RTAs dated September 20, 2001).

In the Order opening this rulemaking, the Department solicited comments on the proposed regulation. The Department received an initial round of written comments from Pioneer Valley Transit Authority ("PVTA") and Merrimack Valley Transit Authority ("Merrimack"). After receipt of the initial comments, the Department conducted a public hearing at its offices on May 17, 2002. The MBTA, Paul Revere Bus Company ("PRBC"), and Entertainment Tours ("Entertainment") testified in favor of the proposed regulation. PVTA testified in opposition to the proposed regulation. On May 24, 2002, the Department received written reply comments from PVTA.

## II. FINAL REGULATIONS

### A. Introduction

This Order adopts a final new provision prohibiting ad wrap material covering bus windows. The provision is part of 220 C.M.R. § 155.00 et seq., which is designed to ensure public safety and general welfare. Overall, the commenters were supportive of the Department's proposed rules. Some commenters, however, objected to the proposal and offered suggestions for changes. The Department has modified the final regulation in response to suggestions from commenters. In this Order, we address the following issues: (1) public safety; (2) fiscal impact; (3) window tinting; and (4) prospective applicability.

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<sup>2</sup> On September 20, 2001, the Director of the Department's Transportation Division requested that all RTAs remove that portion of the ad wrap that covered any part of the windows of the buses under their control.

B. Public Safety

1. Comments

The MBTA testified that after the terrorist attacks on the United States on September 11, 2001, it became apparent that the ad wraps that covered many of the MBTA buses and Green Line trolleys were a safety hazard (Tr. at 5). The MBTA stated that police officers responding to an incident occurring on one of the wrapped vehicles would be unable to see inside the vehicle, which would increase the potential for danger to patrons inside in the event of a hostage-taking, kidnapping, terrorist incident, or other criminal activity (id.). The MBTA explained that it removed ad wrap from all vehicle windows, thereby providing passengers with a much safer environment (id. at 6).

Entertainment testified that one of its fully-wrapped coaches was robbed in a parking lot at a commuter rail station on October 12, 2001 (id. at 12; MBTA Police Report). Entertainment maintained that a police officer arrived at the scene while the robbery was in progress, but could not see inside the fully-wrapped bus (Tr. at 12). According to Entertainment, the police officer went to another part of the parking lot and the armed robbers escaped (id.). Entertainment testified that, in its opinion, the ad wrap covering the windows was a factor in the robbery, and Entertainment has since removed ad wraps from its buses (id. at 13).

PVTA testified that the proposed provision is not necessary to ensure public safety (PVTA Initial Comments at 4). With respect to the robbery of the Entertainment bus discussed above, PVTA argued that no terrorism was involved in that incident, but rather the robbery of

a bus bound for a casino (Tr. at 19). PVTA maintains that the bus was targeted for cash, not because of its wrapped windows (id.). PVTA further argued that the entire premise that ad wrap on the window of the bus hindered law enforcement is incorrect (id. at 20).

## 2. Analysis and Findings

The Department continuously reviews its policies and procedures designed to protect public safety pursuant to the general supervisory authority delegated to it by the General Court. See e.g., G.L. c. 161A, § 3(i); G.L. c. 161B, §6(i). Since the terrorist attacks against the United States on September 11, 2001, the Department has thoroughly reviewed existing policies and procedures, specifically our safety regulations for the operation of motor vehicles that carry passengers, to determine whether specific additional measures should be implemented to ensure public safety and general welfare. The Department has determined that ad wrap presents a threat to the safety of operators and passengers aboard vehicles maintained by RTAs, the MBTA and private bus carriers. The potential threat to public safety was demonstrated by the October 12, 2001 robbery, in which the ad wrap may have hindered the response of law enforcement. See Jules Crittenden, Bandits Rob Bus Bound for Foxwoods, Boston Herald, Oct. 13, 2001.

While PVTA argues that there is a distinction between a routine robbery and a terrorist act, the Department finds that the underlying motive behind the criminal act is not relevant: terrorism is crime with a political motive, after all. As a preventive measure designed to

reduce the likelihood of a motor bus becoming the target of criminal activity,<sup>3</sup> the Department finds that prohibiting ad wrap from passenger side windows is necessary for the public health and general welfare.<sup>4</sup>

B. Fiscal Impact

1. Comments

PRBC testified in support of the proposed provision (Tr. at 8). PRBC stated that it removed ad wrap from bus windows out of concern for the safety of the operators as well as insurance liability concerns (id.). PRBC noted that there is an opportunity to generate revenue on ad wraps without covering passenger side windows (id. at 9).

PVTA maintains that the proposed provision will have a significant and unjustified fiscal impact on the operation of regional transit authorities (id. at 15). PVTA stated that it currently has contracts<sup>5</sup> with two different advertisers that require PVTA to run full ad wraps on its buses (PVTA Initial Comments at 7). PVTA argues that if the proposed regulation is adopted, PVTA will be in breach of both contracts, but acknowledged that it has not attempted to renegotiate the contracts (id.). PVTA testified that advertisers may withhold payment that will

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<sup>3</sup> The United States Department of Transportation reports that 42% of all terrorist activities attack transportation infrastructure, and 34% of those strikes target trains and buses. Urban Transit News, October 17, 2001.

<sup>4</sup> On May 23, 2002, The United States Department of Transportation issued an alert to all transit authorities to the possibility of a terrorist attack on public transportation.

<sup>5</sup> PVTA stated that the first contract is for three buses and expires at the end of September 2002. The second contract is for one bus and expires at the end of April 2004 (Tr. at 22).

result in a loss of \$50,000 in anticipated revenue, which would affect PVTA's ability to continue to offer service it currently provides to its customers (Tr. at 22).

PVTA testified that it is not concerned with the prospective effect of the proposed regulation, but rather the effect on its current contracts with advertisers (id. at 35). PVTA acknowledged that the change in Department regulations may be an appropriate defense to any breach of contract claim by advertisers (id. at 31). PVTA further stated that it intended to generate income in the future through advertising contracts without wrapped windows (id. at 34, 35).

## 2. Analysis and Findings

The Department finds that, in this instance, public safety concerns outweigh any potential financial loss to advertising revenues. The record is clear that advertising revenues can still be generated through ad wraps that do not cover the bus windows (id. at 9, 34, 35). The Department notes that all other RTAs and the MBTA have removed ad wrap from buses with concomitant loss in advertising revenues. The Department finds that PVTA's potential for temporary financial loss does not warrant deferring the full and immediate implementation of the proposed regulation.

## C. Window Tinting

### 1. Comments

PVTA testified that the proposed regulation draws an arbitrary distinction between window tinting and ad wraps (PVTA Initial Comments at 2). PVTA argues that

220 C.M.R. § 155.04(10)(e), which permits transparency-changing tinting on a bus's side windows, presents a similar threat to public safety, in that members of law enforcement cannot see into a bus with tinted windows (id. at 4). PVTa stated that the proposed regulation must fail because it does not alter current Department regulations concerning window tinting (id.).

2. Analysis and Findings

The Department does not agree with PVTa's argument concerning transparency-changing tinting. 220 C.M.R. § 155.04(10)(e) was adopted by the Department based on federal regulations designed to ensure that a bus driver has a clear view through the windshield, driver's side windows and rear window. 49 C.F.R. § 571.205. Furthermore, the Department finds that tinting of passenger side windows is distinct from the application of ad wraps, which completely eliminates the view into a bus. The Department does not see the need to modify 220 C.M.R. § 155.02(10)(e), which mirrors federal requirements, in this rulemaking.

D. Prospective Applicability

1. Comments

PVTa and Merrimack stated that they would have no opposition to the adoption of the Department's proposed regulation should the Department include a grandfather clause permitting existing ad wraps to remain on buses until the end of applicable contracts (Tr. at 35; Merrimack Initial Comments at 1). PVTa is the only bus company in the Commonwealth that continues to have full ad wraps on buses in revenue service (Tr. at 36). As of October 1, 2002, PVTa will only have one bus under contract with ad wrap (id. at 39).



## 2. Analysis and Findings

Given that all other RTAs, the MBTA, and private bus carriers have complied with the Department's previous directive to remove ad wrap from bus windows, the Department declines to adopt a grandfather clause that in essence would only affect one bus. While the Department declines to accept PVTA and Merrimack's request that the proposed regulation be applied prospectively, we determine that the regulation will be subject to the exemption provision, currently codified as at 220 C.M.R. § 155.02(30), which states: "[t]he foregoing rules and regulations . . . are also subject to exceptions as the Department may consider just and reasonable upon application of a carrier." The Department accepts the suggestion to re-number the proposed regulation from 220 C.M.R. § 155.02(34) to 220 C.M.R. § 155.02(29), thus including the regulation within the scope of the exemption provision.

## III. ORDER

After considering the comments received on the proposed regulation, the Department now issues final regulations that balance the concern for public safety while taking into account transit authorities and private bus carriers' need to generate revenue to fund their transit system. Accordingly, after notice, hearing and consideration, it is hereby

ORDERED: That the regulation designated as 220 C.M.R. § 155.00 et seq. and entitled "operation of motor vehicles for the carriage passengers for hire under a certificate of public convenience and necessity, charter license, special service or school service permit" to prohibit ad wrap under 220 C.M.R. § 155.02(29) attached hereto are hereby ADOPTED; and it is

FURTHER ORDERED: That the Secretary to the Department shall cause the revised regulation, adopted today and attached hereto, to be transmitted to the Secretary of the Commonwealth for publication in the next number of the Massachusetts Register for inclusion in the Code of Massachusetts Regulations, and it is

FURTHER ORDERED: That this regulation shall be effective upon publication in the Massachusetts Register.

By Order of the Department,

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Paul B. Vasington, Chairman

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner